

No. 2867.

IN THE
United States
Circuit Court of Appeals,
NINTH CIRCUIT.

William O'Brien,

Plaintiff in Error,

vs.

Las Vegas & Tonopah Railroad
Company, (a corporation),

Defendant in Error.

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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

C. O. WHITTEMORE,
Counsel for Defendant in Error.

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This case is before the court on alleged errors relating to evidence offered by defendant in error, and admitted by the court over the objection of plaintiff in error, and to the failure of the court to give certain instructions requested by plaintiff in error; also alleged error in the court's instructions to the jury.

The court will not consider any questions relating to the sufficiency of the evidence to support the verdict,

although a considerable part of the brief for plaintiff in error is devoted to a discussion of this subject.

As to issues of fact submitted to a jury on the trial of a cause in the Circuit Court, the verdict of the jury is conclusive on appeal.

St. Louis Paper Box Company v. Hubinger etc.,
100 Federal 595, 40 C. C. A. 577.

A court of error cannot review evidence to determine the correctness of a verdict.

Great Northern Railway v. McLaughlin, 70 Federal 669, 17 C. C. A. 330.

This rule is well stated in Transit Development Company etc. v. Cheatham etc., 191 Federal 963-4, as follows:

“When disposed of by the verdict of a jury properly instructed its decisions * * * are not reviewable by the Appellate Court.”

Also, the rule is well stated in South Western Brewery and Ice Company v. Schmidt, 226 U. S. 162, 57 L. Ed. 170, as follows:

“Whether there is creditable evidence to sustain the verdict is a question for the jury and not for an Appellate Court.”

The principal objection raised by counsel for plaintiff in error to the instructions of the court to the jury, and failure of the court to give an instruction in the exact language as requested by counsel for plaintiff in error, is that the court instructed the jury to consider all of the evidence in determining the question of negligence of the defendant in error. Counsel contends that the

jury should not have been allowed by the court to consider any of the evidence offered by plaintiff in error in determining the question of the negligence of defendant in error even though such evidence tended to show that the defendant in error was not negligent. After devoting considerable space in his brief to this point, counsel at the conclusion of his brief insists that there was absolutely nothing in plaintiff's evidence tending to exculpate defendant, and avers that if under defendant's contention it should be conceded that there was evidence in plaintiff's case tending to exculpate defendant, that such evidence was not affirmative and utterly failed to establish that defendant in error was in nowise at fault or to blame for plaintiff's injury. If such is the fact, then no injury resulted to the rights of plaintiff in error by the court's instructions that the jury should consider all of the evidence in determining the question of want of negligence on the part of defendant in error.

The testimony of plaintiff included in the record shows that the plaintiff and four Mexicans were the only persons present when the accident occurred. Upon cross-examination of plaintiff in error as shown in the record certain facts were brought out by counsel for defendant in error, showing and tending to show that the accident was not the result of negligence of defendant in error, and it was partly on the testimony of the plaintiff in error, brought out on cross-examination, that the facts were disclosed which tended to overcome the presumption of negligence of the defendant in error. It is contended by counsel for plaintiff in error

that the jury should not have been allowed to consider any of this testimony.

Counsel for plaintiff in error in a supplemental brief calls the attention of this court to the case of Hawkins v. Bleakly, recently decided by the Supreme Court of the United States. The question decided in the case last referred to is upon the constitutionality of a statute of the state of Iowa similar to the Workmen's Compensation Act of the state of Nevada under consideration in the present case, and which the court holds to be constitutional. No question is presented in the present case as to the constitutionality of the Workmen's Compensation Act of Nevada. The Supreme Court of the United States in the case of Hawkins v. Bleakly refers to the provision in the Iowa statute similar to the Nevada Workmen's Compensation Act, which provides that in an action against an employee who has rejected the act, it should be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut the presumption of negligence. In support of the constitutionality of this act the court quotes the case of Mobile etc. R. R. v. Turnipseed, 219 U. S. 35-42. In this case the constitutionality of a statute of Mississippi was questioned, which provides that evidence of an injury arising from the actual operation of trains, shall be *prima facie* evidence of want of skill on the part of the servants of the railroad company. The court in discussing the constitutionality of the Mississippi statute uses this language:

“The only effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end and the question of negligence is one for the jury upon all of the evidence.”

We submit that the language of the Supreme Court of the United States in the case just quoted from is almost the exact language used by the court in its instruction to the jury in this case.

Further referring to the provisions of the Mississippi statute above referred to, and to similar provisions in statutes generally, the Supreme Court uses this language:

“So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

“If a legislative provision not unreasonable in itself, prescribing a rule of evidence in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.”

Counsel for plaintiff in error would have this court so construe the Workmen's Compensation Law of Nevada as to bring said law directly within the objectionable provisions as pointed out by the Supreme Court of the United States in the language just quoted. It will be presumed by this court, in the absence of anything in the record to the contrary, that the defendant

in error in this case did produce some affirmative evidence tending to overcome the presumption of defendant's negligence, and having done so, defendant in error was entitled to have the jury consider all of the evidence offered in the case in determining whether or not the injury complained of as the result of the accident was due to the negligence of defendant in error. We respectfully submit that none of the assigned errors are well taken and that, therefore, the judgment should be affirmed.

Respectfully submitted,

C. O. WHITTEMORE,

Counsel for Defendant in Error.